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No. 277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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I

Although it urges the Court to deny certiorari, the Commission does not and can not deny:

1. That the issue of the propriety of including in the capitalization of a natural gas company its tax deferrals accumulated under Sections 167 and 168 of the Internal Revenue Code at a return of only 1.5 percent involves a matter of great and continuing importance;

2. That although Section 167 was enacted in 1954 and Section 168 was enacted in 1950, the question of

the proper treatment of these accumulated tax deferrals is still, to use the Commission's own words (Br. in Opp., p. 9), "a much mooted problem in fixing utility rates," thereby resulting in great uncertainty and making it impossible for natural gas companies to make informed decisions on tax matters of great importance; and

3. That the Commission's present position, approved by the court below, represents a departure from the Commission's prior and consistent rulings which the court of appeals had approved in *City of Detroit* v. *F.P.C.*, 230 F. 2d 810, 822 (D.C. Cir. 1955), *cert denied*, 352 U.S. 829, (1956),[2] and on which Panhandle had expressly relied in electing to use Sections 167 and 168.

II

Having in effect conceded the importance of the question of the treatment of the accumulated tax deferrals, the Commission presses for the denial of certiorari on the ground that the decision below is clearly correct. But such a determination by the Court is more appropriately made after full briefing and oral

[1] The Commission is less than candid when it undertakes to bedevil the fact that the full return has been allowed by several state Commissions on these accumulated tax deferrals (see Br. in Opp., pp. 10-11). There is no question that in the absence of assignment of any "specified rate of return" (Br. in Opp., p. 10) a full return is allowed automatically on the accumulated tax deferrals.

[2] The Commission's reference to the pending proceeding in *Alabama-Tennessee Natural Gas Co.* (Br. in Opp., p. 11, fn. 8) and the concomitant possibility that it might adopt yet a third position on the treatment of these accumulated tax deferrals serve to emphasize the need for a definitive ruling by this Court in order finally to put the problem at rest.

argument by the parties, rather than on the limited presentation now before the Court, particularly in view of the importance of the matter. Moreover, one need not look any further than the sharp division in the court below and the vigorous dissenting opinion of Judge Miller to appreciate that the decision of the majority below is, to say the least, far from clearly correct. To the contrary, the decision below, we submit, is erroneous and the arguments advanced by the Commission in support thereof are without merit or substance.

1. The Commission's argument, that Sections 167 and 168 are nothing more than tax reduction provisions, the benefits of which a regulated company is no more entitled to retain than it would be to retain the benefits of, say, a reduction in the general corporate tax rate (Br. in Opp. p. 12), is unsound. As both the Commission and the court conceded in their opinions below, the legislative history of Sections 167 and 168 plainly reveals that these Sections are not general tax reduction provisions but were enacted for the specific and special purpose of encouraging all taxpayers, regulated as well as unregulated, to make increased investments in plant and equipment. And, as shown in our Petition (at p. 13), Congress plainly understood that it was essential to the achievement of this purpose that the benefits of the tax deferrals resulting from the use of these provisions should be available for retention by the taxpayer companies. The allegation (Br. in Opp. pp. 12-13), unsupported by the record, that in certain competitive situations an unregulated company may believe it better business to use its temporary tax deferrals to lower prices, does not indicate that the Congressional purpose has not been satisfied as far as most other unregulated companies are concerned. Nor does it justify the denial of the bulk of these benefits to a regulated company as here sanctioned by the court below.

2. Allowing a regulated company to retain the full benefits of Sections 167 and 168 does not mean, as the Commission further argues, that "regulated business *pro tanto* cease to be subject to regulation." (Br. in Opp., p. 12). Rather, allowing these companies to retain these benefits permits Sections 167 and 168 to operate as Congress intended. Not only are Sections 167 and 168 *not* "rate-reducing provisions as to regulated companies" (Pet. App., p. 43a), but "unlike the Natural Gas Act itself [they are] not for consumer benefit . . ." and have "a different public policy [which] should be given effect as intended by Congress" (*City of Detroit, supra*, 230 F. 2d at 822).

3. Nor is it correct to say that "the shareholders of a regulated company benefit at the *expense* of the ratepayers" (Br. in Opp., p. 13; see, also, p. 11) (emphasis supplied). It is true that the rates paid by the ratepayers are not reduced by virtue of the taxpayers' use of Sections 167 and 168, as they might be if these Sections were general tax reduction provisions. But such a comparison is misleading since, as already shown, Sections 167 and 168 are in fact not general tax reduction provisions.

It is far more pertinent to compare the rates paid by the ratepayers absent the taxpayer company's election to utilize Sections 167 and 168 with those paid when the company utilizes these Sections and retains the benefits thereof. As pointed out in our Petition (at pp. 16-17), the ratepayers in these circumstances pay virtually the same rates as they would pay if the company had elected not to use Sections 167 and 168. As the court below correctly found in *City of Detroit, supra*, 230 F. 2d at 822:

> ". . . the solution of the Commission [allowing the taxpayer company to retain the full benefits of Section 168] does not result in higher rates to the consumer. It simply does not operate to

reduce them. It aids Panhandle, but neither aids nor harms [the ratepayers]."

4. In this regard, it should be noted *El Paso Natural Gas Co. v. FPC*, 284 F. 2d 567 (5th Cir. 1960), *cert. denied, sub nom. California v. FPC*, 366 U.S. 912 (1961), does not provide any support for the Commission's position, much less does it justify the heavy reliance placed upon it by the Commission (see Br. in Opp., pp. 13, 14).[3] For, in that case, the Commission, as it implicitly admits (Br. in Opp., p. 13, fn. 14), had allowed a full return on the company's accumulated tax deferrals. And while the Fifth Circuit disagreed with the Commission's treatment of tax benefits under other sections of the Internal Revenue Code not involved here, it expressly affirmed the Commission's action with regard to the tax deferrals accumulated as a result of the company's use of Section 167. See 284 F. 2d at 573-574.

Thus, when viewed in the context of the court's decision, it is apparent that the language from *El Paso* quoted by the Commission (Br. in Opp., p. 14), does not support the Commission. Quite the contrary, that language constitutes recognition (a) that Sections 167 and 168 concern only the taxpayer companies and the United States Treasury, without, in any way, involving the consumer or Commission regulation under the Natural Gas Act, and (b) that the principles of rate regulation which the Commission also attempts to invoke (Br. in Opp., p. 13) are inapplicable.

[3] The Commission's bald assertion that *City of Detroit* did not involve any issue as to the proper rate of return on the accumulated tax deferrals (Br. in Opp., p. 14, fn. 15) ignores the showing in our Petition (at pp. 12-13, fn. 12) demonstrating the invalidity of the same assertion by the courts below. Recitation by the Commission, in the teeth of this demonstration and without even mention thereof, does not render the assertion any the more valid.

5. The Commission further contends that it had provided sufficient incentive to induce the taxpayer companies to utilize Sections 167 and 168 (Br. in Opp., pp. 14-15).[4] But this contention overlooks the fact that Congress in enacting Sections 167 and 168 had determined the quantum of the incentive and made it equally applicable to every segment of America's industry, including the natural gas industry. In these circumstances, the Commission's view that a lesser incentive would be sufficient, does not operate to authorize it—or the court below—to reduce the incentives prescribed by Congress.[5] Any change in the incentives provided by Sections 167 and 168 is, of course, for Congress, not the Commission or the court below, to determine.

6. Finally, the Commission seeks to justify the abandonment of its prior consistent position with the explanation that "the Commission's views as to the objectives of particular tax laws are surely subject to revision in light of additional experience and understanding" (Br. in Opp., p. 15). It fails to mention that such a revision would operate not just prospectively but retroactively against the numerous companies, including Panhandle, which had participated

[4] The incentives the Commission would allow are in fact inadequate (see Petition pp. 17-18). This error of the Commission is due in part to its failure to recognize that Congress intended the taxpayer company not only to utilize Sections 167 and 168, but to invest the resulting tax deferrals in new plant and facilities (see Petition pp. 15-16). Thus Congress sought to spur investment, whereas the Commission misunderstood the Congressional intent as merely seeking to spur the companies to file for the tax benefits.

[5] Since Panhandle is seeking only the incentives granted to it by Congress, the Commission's slanted comment that it "• • • is not required to pay petitioner or any other company its asking price" (Br. in Opp., p. 15, fn. 17) is uncalled for and entirely unjustified.

in its earlier proceedings and had taken action in reliance on this prior position. Furthermore, whatever may be the merits of such an argument with regard to matters committed to the Commission's expertise, the determination of the Congressional objectives in enacting Sections 167 and 168 plainly is not a matter within the Commission's special expertise.

As a Federal Power Commissioner recently stated in addresing himself to the scope of the power of an administrative agency,

> "* * * A regulatory agency must abhor any action which goes beyond the limits of its statutory authority. *I know of no statute which confers power on a regulatory agency to write its own legislation when it feels the existing laws are inadequate.* * * * Jurisdiction is established by law, and remains as thus established until changed by the legal processes available through Congress. *Any reach for powers beyond those which are clearly set forth by the statute* would represent a breach of public trust and endanger our whole concept of utility as practiced in this country." (Address of Commissioner Harold C. Woodward before the Independent Natural Gas Association, September 17, 1963).

Moreover, in addition to the fact that the Commission's prior reading of the Congressional objectives has been affirmed upon independent analysis by various courts of appeals (see Petition pp. 5-6), it should be noted that the only "additional experience" since the Commission's adoption of its earlier position has been the lack of any Congressional action indicating disagreement with the Commission's consistent determinations. Indeed, as shown in our Petition (at p. 14), Congress has been advised on several occasions of the decisions of the Commission and the courts; and

although it has amended Sections 167 and 168 in other respects, it has not amended or otherwise changed the basic provisions of the Sections. Since the validity of these earlier holdings was thus approved and affirmed, it is apparent that this "additional experience" undermines, rather than supports, the Commission's reversal of position.

III

Similarly without merit is the Commission's attempt to support the participation and casting of the decisive vote by Judge Edgerton in the *en banc* decision.

1. The fact that a federal judge has the right under Article III of the Constitution to retain office so long as he chooses (Br. in Opp., p. 16) is wholly irrelevant.[6] The problem here presented concerns the propriety, in the circumstances here involved, of Judge Edgerton's participation in *en banc* proceedings under a Congressional statute (28 U.S.C. 46(c)) which, in authorizing these extraordinary proceedings, specifically defines the composition of an *en banc* court. Thus, the issue here presented is statutory rather than constitutional in nature. Cf. *United States* v. *American-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960).

2. The Commission's further contention that Judge Edgerton's action was appropriate "* * * to prevent the unfortunate void which was presented in the *American Foreign Steamship* case * * *" (Br. in Opp., p. 17), and to permit "a smooth transition" (Br. in Opp.,

[6] It is well settled that a retired judge is nonetheless a judge within Article III entitled to all its protections. See *Booth* v. *United States*, 291 U.S. 339, 350-1 (1934); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 584 (1962). Otherwise, of course, he could not sit in conventional judicial proceedings.

p. 18) have already been rejected by this Court, at the urging of the Government,[2] in the *American Foreign Steamship* case. In that case, the Court of Appeals had sustained the propriety of Judge Medina's participation in *en banc* proceedings specifically on the ground that it was appropriate in order to avoid the need to "suspend [the court's] judicial task." *See American-Foreign S. S. Corp.* v. *United States*, 265 F. 2d 139, 154 (2d Cir., 1959). And this Court, in reversing on the Government's petition, expressly noted that "* * * if the statute is to be changed, it is for Congress, not for us, to change it" (363 U.S. at 691).

3. Finally, contrary to the Commission's assertion (Br. in Opp., pp. 17-18), there is no correlation between Judge Edgerton's action and the suggestion of Judge Kaufman in *United States* v. *Allocco*, 305 F. 2d 704, 712 (2d Cir., 1962), *cert. denied*, 371 U.S. 964 (1963). Not only is there nothing in Judge Kaufman's opinion relating to court of appeals *en banc* proceedings but the issues before him were entirely different. The *Allocco* case concerned the President's power, under Article II, Section 2 of the Constitution, to make recess appointments, the status of a district judge sitting under such an appointment and the latter's authority to preside at, and to impose sentence in, a criminal proceeding.

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[2] See Brief for the United States in No. 138, October T. 1959 at pp. 13-14, 18-19.

[3] The Commission implies (Br. in Opp., p. 17, fn. 18) that Panhandle had waived its objection to Judge Edgerton's participation in the *en banc* decision by not raising it until its petition for rehearing. This implication flies in the teeth of *Glidden* v. *Zdanok*, *supra*, where this Court rejected a similar argument of the Government. Here, as in *Glidden*, "the statute claimed to restrict authority is not merely technical but embodies a strong policy con-

CONCLUSION

For the foregoing reasons as well as those set out in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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erning the proper administration of judicial business" (370 U.S. at 535-536; cf. *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U.S. 260, fn. 20 (1953)) and hence Panhandle's objection may be considered "on direct review even though not raised at the earliest practicable opportunity" (370 U.S. at 536; see, also, *United States* v. *Allocco*, *supra*, at 706-708).

Moreover, the fact is that Panhandle did raise its objection at the earliest practicable opportunity. The Commission's contrary suggestion assumes Panhandle's position to be based solely on Judge Edgerton's advice to the President of his intention to retire (Br. in Opp., p. 17). Although this alone may well have been sufficient to have disqualified Judge Edgerton from further participation in *en banc* proceedings, Panhandle's position here is based, in addition, on the further fact that the *en banc* decision was issued at a time when the condition Judge Edgerton had imposed was on the verge of fulfillment, if not actually fulfilled, i.e., his successor had been confirmed by the Senate. Plainly, therefore, Panhandle's raising of the objection in its petition for rehearing was at the earliest practicable opportunity.